
Initial Submissions in Respect of the *(Re-issued/Revised) Draft “Bitstream and Shared/Full Loop” Regulations, 2013 – 9th September 2013*

Paul AH Hjul

As invited in Notice 940 of 2013 appearing in *Government Gazette* 36840 of the 11th September 2013.

Principal Submissions: The proposed regulations are likely to cause more harm than good in bringing about Local Loop Unbundling.

In so far as the regulations provide a template and advisory means to facilitate the provisioning of certain facility leasing instances, they should be welcomed as “Guidelines”. However, as regulations to be promulgated without a proper chapter 10 market review, the Authority is simply inviting further delays on a horribly overdue part of transforming the industry.

Submission Set as at 11th October 2013

Opening Remarks

ICASA needs to commence a zero tolerance policy in enforcing facilities leasing if we are to expect the implementation of Local Loop Unbundling.

There is a clear mandate in the Electronic Communications Act 36 of 2005 (as subsequently amended) that electronic communication network operators must (i) make “essential facilities” available to each other on a wholesale lease basis and (ii) interconnect their networks. Despite this mandate, the South African ICT landscape has failed to develop to a point where there is a resilient and interconnected system of electronic communications networks owned, and managed, by different licensed operators in a manner transparent to individual consumers who are able to acquire their internet services from an internet service provider of their choice.

Currently, the vast majority of South Africans are entirely dependent on a Telkom postpaid utility account and subscription to an analogue voice service in order to have access to fixed broadband in the form of ADSL. No other network operator is providing an ADSL service and alternatives to ADSL for fixed line and even “uncapped” broadband are not widely available.

The discourse of “managed liberalization” has been the greatest reason why South Africa has failed to become a society fully incorporated into the Internet era in which the globe now finds itself. Government’s obsession with being the driving force has meant that, rather than seeing the endless invention in ICT of the last 40 years, South Africa has languished to a point where it fails to compete with developing nations on key ICT indicators:

Out of the chaos of new ideas for communication, the experiments, the tentative designs, and crucible of testing, there emerged a cornucopia of networks. Beginning with the ARPANET, an endless stream of networks evolved, and ultimately were interlinked to become the Internet ... all the information that erupted with volcanic force from the intensity of the debates and discussions and endless invention that has continued unabated for 30 years.

Quoted from RFC 2468 *I Remember IANA*¹

¹ <http://tools.ietf.org/html/rfc2468>

Sadly, it appears that during the period November 2011 – July 2013 the promise of LLU has been betrayed by a series of gross mishandlings of the communications sector by what can only be described as an inefficient regulator and a parasitic and corrupt Minister.

INTRODUCTION

1. These submissions are made in reply to the invitation for comment by “interested persons” appearing in the Government Gazette on the 11th September 2013.
 - a. Same invitation sets a deadline for “proposals” (page 3) for 30 days from the date of publication which is the 11th October 2013 (considering all days of the week and discounting public holidays).
 - b. This submission set contains proposals and comments on the draft regulations as reissued. As such, the final paragraph of page 3 of GG 36840 is read as serving as an invitation on the same terms as earlier invitation appearing on page 4 which invites “written representation” by the 9th of September 2013.
 - c. I submit that an alternative reading, such that the authority is only accepting “proposals”, is anomalous and that the authority cannot possibly only be seeking proposals arising from the draft regulations.
 - d. The invitation of the 9th August requires that electronic submission be done by way of “in Microsoft word” which I have understood to mean that an email must contain an attachment generated in Microsoft Word. I have therefore attached this submission set in both a .doc and a .docx file to ensure compliance
2. The general theme of these submissions is to follow on from an earlier submission set, submitted when the Authority invited discussion in 2011 (by way of Notice 409 of 2011) – and held public hearings into Local Loop Unbundling. Further that the approach of the draft regulations exceeds the parameters of facilities leasing as discussed in 2011.
3. The perspective of the author remains that of a consumer of Internet services. Should the authority conduct public hearings or wish for further discussion on these regulations, I would welcome such an opportunity.

CONCERN THAT THE DRAFT REGULATIONS FAR EXCEED FACILITIES LEASING AND REPRESENT A DEPARTURE FOR THE AUTHORITY'S POSITION PAPER

4. I submit that the provisions of the Facilities Leasing Regulations and the core requirements to lease essential facilities appearing in the Act are sufficient to provide for

the leasing of all physical components and subsequently that additional regulations are unnecessary.

5. However, the draft regulations move significantly outside of the parameters of facilities leasing of physical components of an electronic communications network:
 - a. Firstly the regulations seek to deal with Bitstream Access which, on the definition provided, falls squarely within the parameters of a service as opposed to a facility. The view of the inability for the Authority to depend on facilities leasing to provide Bitstream regulations was set forth comprehensively by operators during the 2011 hearings².
 - b. The inclusion of “radio frequency” within the definition of the “Local Loop” similarly falls outside of the scope of a leased facility. As an initial concern network operators do not own radio frequency and the framework for spectrum control in South Africa does not lend itself to radio frequency being thought of as a facility.
 - c. The inclusion of “voice” as a component of the definition of both “Aggregation Point” and “Full Loop Access” moves outside of the parameters of arrangements for a physical facility and into the domain of a service regulation.
6. I submit that the draft regulations will not survive a legal challenge by Telkom (who have a commercial interest in challenging the proposed regulations) and that Telkom’s historic assertions of the need for a Regulatory Impact Assessment (RIA) to be conducted before introducing regulations strongly applies. Paradoxically the RIA argument fundamentally holds that facilities based LLU should not be discontinued by regulatory change either³.

² Consider the submissions of Vodacom – and in the event that Vodacom acquires Neotel they will be a major “beneficiary” of LLU: “In addition, should ICASA intend to unbundle services as opposed to facilities as part of the local loop unbundling process, such as Bitstream and the wireless local loop, Vodacom is of the view that the Facilities Leasing Regulations will not be applicable for this purpose and the only means to regulate (‘unbundle’) such services will be through the Chapter 10 market review process.

³ Dr Barendse whilst heading regulatory matters at Telkom frequently made mention of a need for RIAs before introducing new regulations. It is respectfully my view that as the ECA mandates facilities leasing of essential facilities for the authorities to move away from implementation of facilities based LLU would constitute a regulatory change to the prejudice of persons who have made business decisions based on the presented regulatory landscape to be implemented and that same would therefore require a RIA and comprehensive market review and research.

7. I further submit that if cognizance is given to the determination of the Complaints and Compliance Committee in matter 59/2011 (*Neotel vs Telkom*) and the holding of the Committee that:

In view of the fact that ICASA must still develop Local Loop Unbundling Regulations, also taking into account that Telkom is the first offender in a case of this nature, the CCC recommends that no fine be imposed on Telkom. However, Telkom must be warned to follow the rules and pay attention to legal requirements stipulated in the ECA and the Regulations otherwise the CCC will not hesitate to recommend a harsh penalty allowable under the regulations in future.

It is necessary to consider whether the process of embarking on regulations which simply invite a legal challenge is sensible at all.

8. I therefore submit that the authority should abandon the proposed regulations and instead turn to enforcing the Facilities Leasing Regulations while embarking on workshops on facilities and services unbundling and wholesale provisioning.
9. In the event of the Authority holding itself as bound, as a result of a direction by a previous Minister, to develop regulations, I submit that the best approach is to request that the current Minister address this issue rather than to persist in creating a regulatory mess as a result of the dealings of politicians.

THE SUB-LOOP

10. The exclusion of discussions on sub-loop unbundling are peculiar as future network developments will ultimately take place within a context of shortened local loop.
11. In particular, the proposed regulations appear to completely discount the reality that ideally various operators should own facilities that make up the local loop and national backhaul networks and that these operators cooperate, in accordance with good business practice and generally accepted Internet standards, in order to enable each other to offer information and communications service (particularly Internet services). Subsequently, a situation should exist where Telkom is able to lease out ducts and copper to another operator who installs equipment on a “sub-loop” basis which is in turn available on a wholesale basis to Telkom⁴.

⁴ As an illustration: MTN should be able to lease ducts and copper which Telkom has running at a

12. Further the market should develop such that if Telkom wishes to sell parts of its copper assets to other operators who are able to manage and maintain on a wholesale basis those parts of the network the regulatory environment should accommodate such a situation.

DISPUTE RESOLUTION PROVISIONS

13. There is a litany of typographical errors with the numbering in regulation 11:

- a. Regulation 11(a)(ii) refers to “regulation 4(2)” and no such regulation exists. However, it appears quite clearly that regulation 4(b) is meant and as “b” is the 2nd letter of the alphabet.
- b. Regulation 11(a)(iii) refers to “regulation 4(3)” and no such regulation exists. However, it appears quite clearly that regulation 4(c) is meant and as “c” is the 3rd letter of the alphabet.
- c. Regulation 11(d)(ii) refers to “regulation 11(2)” and no such regulation exists. However, it appears quite clearly that regulation 11(b) is meant and as “b” is the 2nd letter of the alphabet.
- d. Regulation 11(f) refers to “regulation 11(5)” and no such regulation exists. However, it appears quite clearly that regulation 11(e) is meant and as “e” is the 5th letter of the alphabet.

14. I submit that the authority simply lacks capacity and institutional credibility in the field of dispute resolution to serve as an arbiter of dispute resolution where the dispute is not a matter of recalcitrance. In particular I submit that the provision of regulation 11(g) are wholly inappropriate.

15. Instead I submit that operators should design their own processes for dispute resolution and, in the absence of compliance with the regulations, the matter should fall within the parameters of the Complaints and Compliance Committee.

16. I therefore submit that the entirety of draft regulation 11 be reconsidered.

distance rendering high speed DSL impossible such that the copper connects at MSAN cabinet which MTN installs and provides backhaul to – possibly using the Telkom ducts with fibre.